

Internal Revenue Service
memorandum

CC:TL-N-9812-89
VWATERS

date: 30 NOV 1989

to: District Counsel, Denver SW:DEN
Attn: David P. Monson

from: Assistant Chief Counsel (Tax Litigation) CC:TL

subject: TEFRA Statute of Limitations

This is in response to your August 31, 1989, request for tax litigation advice regarding the above-mentioned subject.

QUESTIONS PRESENTED

1. Whether I.R.C. §§ 6501 and 6229 set forth separate periods of limitations for assessment?
2. What is the period of limitations on assessment of a deficiency resulting from items which have converted from partnership items to nonpartnership items due to the filing by the taxpayer of a petition in bankruptcy?
3. What are the applicable provisions which will operate to extend the period of limitations under section 6229(f)?

CONCLUSIONS

1. Sections 6229 and 6501 set forth separate periods of limitations for assessment.
2. Partnership items which have converted to nonpartnership items by reason of bankruptcy must be assessed within the one year period provided by section 6229(f). If assessment is barred by the bankruptcy stay provision of 11 U.S.C. § 362(a), a notice of deficiency must be issued within the one year period of section 6229(f) in order to suspend the period for assessment.
3. Section 6229(b)(1)(B), which authorizes consents at the partnership level, only applies to the statute under section 6229(a) and does not apply to section 6229(f). Rather, the Technical and Miscellaneous Revenue Act of 1988 provided an amendment to section 6229(f) to allow for extensions of the one year statutory period for making assessments. In addition, if an extension of section 6501 is executed after conversion, the extension should apply to the converted items.

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DISCUSSION

1. Whether I.R.C. §§ 6501 and 6229 set forth separate periods of limitation for assessment.

The Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA") provided for a unified partnership level audit and proceeding. Section 6229(a) provides that the period for assessing any tax imposed by subtitle A attributable to partnership or affected items shall not expire before three years after the later of the date the partnership return was filed or the last day for filing such a return.

An issue arises as to whether section 6229(a) and section 6501(a) are separate periods of limitations for assessment or whether section 6229(a) is an extension of section 6501(a). Section 6501(a) provides in pertinent part:

(a) General Rule.- Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed.

The return referred to in section 6501(a) is the partner's individual income tax return. In comparison, the period for assessment under section 6229(a) is based upon the filing of the partnership return.

Section 6229(a) states that it is limited to partnership and affected items. What is not clear is whether section 6229(a) is the exclusive period of limitations for assessment of partnership and affected items. There are two possible interpretations of the general rule found in section 6229(a). One approach is that the three year period of limitations of section 6501(a) covers all items, including partnership items. Under this interpretation, section 6229 merely operates to extend the period of limitations under section 6501 with respect to partnership items. This approach is referred to as the statute extension approach. The other approach is that section 6229(a) sets out a separate three year period of limitations for partnership items, while section 6501 refers only to nonpartnership items. This approach is known as the separate statute approach.

This office believes that these sections establish separate periods of limitations. We have adopted the separate statute approach in order to foster protection against expired periods of limitations. This approach should be followed in all cases.

Therefore, if the section 6229(a) period of limitations has expired with respect to partnership items, our position is that the case should be conceded even though the section 6501 statute may be open for one or more partners.^{1/}

2. The applicable periods of limitations for partnership items which have converted to nonpartnership items by virtue of a partner filing for bankruptcy

Section 6231(b)(1)(D) provides:

(b) Items Cease To Be Partnership Items in Certain Cases.-

(1) In general.- For purposes of this subchapter, the partnership items of a partner for a partnership taxable year shall become nonpartnership items as of the date-

(D) such change occurs...under subsection (c) of this section.

The partnership items of a partner who is named as a debtor in a bankruptcy petition are converted under section 6231(c). The regulations provide that the items become nonpartnership items upon the filing of the bankruptcy petition. See Temp. Treas. Reg. § 301.6231-7T(a). Section 6229(f) provides the period of limitations for assessing the converted partnership items. Section 6229(f) provides:

(f) **Items Becoming Nonpartnership Items.**-If, before the expiration of the period otherwise provided in this section for assessing any tax imposed by subtitle A with respect to the partnership items of a partner for the partnership taxable year, such items become nonpartnership items by reason of 1 or more of the events described in subsection (b) of section 6231, the period for assessing any tax imposed by subtitle A which is attributable to such items (or any item affected by such items) shall not expire before the date which is 1 year after the date on which the items become nonpartnership items. The period described in the

^{1/} See discussion in Part 2 below regarding cases where the section 6501 period of limitations may apply because the period under section 6229(f) would expire in less than one year.

preceding sentence (including any extension period under this sentence) may be extended with respect to any partner by agreement entered into by the Secretary and such partner (emphasis supplied).

Section 6229(f) is the specific provision in the TEFRA period of limitations for converted items; however, the converted partnership items are also arguably governed by section 6501(a) to the extent that section has not expired. This office believes that section 6229(f) and section 6501 create separate periods of limitations. Generally, we will not defend the timeliness of statutory notices of deficiency issued after the period under section 6229(f) has expired, even if the period under section 6501 remained open at the time of issuance of the notice of deficiency. However, based upon the "shall not expire before" language in section 6229(f), and depending on the facts and circumstances of each case, we may be willing to argue that section 6501 applies to converted partnership items where the period under section 6229(f) will expire less than a year after the partnership and partner file their returns. These situations must be coordinated with the national office.

It should be noted that the suspension provision of section 6503(i) does not expressly apply to section 6229(f) since section 6503(i) by its own terms only applies to section 6501 and 6502. Section 6503(i) provides:

The running of the period of limitations provided in section 6501 or 6502 on the making of assessments or collection shall, in a case under title 11 of the United States Code, be suspended for the period during which the Secretary is prohibited by reason of such case from making the assessment or from collecting and-

(1) for assessment, 60 days thereafter, and

(2) for collection, 6 months thereafter.

However, based upon the "shall not expire before" language in section 6229(f), we conclude that if the period of limitations under section 6501 is still open without regard to extensions at the time the debtor's partnership items become nonpartnership items by reason of the commencement of a bankruptcy proceeding, the Service should get the benefit of the suspension provided by section 6503(i). Accordingly, depending on the facts and circumstances of each case, we may be willing to defend such cases. On the other hand, if on the date the debtor's partnership items convert to nonpartnership items due to the commencement of a bankruptcy proceeding the period of limitations under section 6501 has expired or is only open because of an extension, it is our position that section 6503(i) does not apply

and the Service is limited to the one year period provided by section 6229(f).

Where section 6503(i) will not suspend the period for assessment upon the filing for bankruptcy, a notice of deficiency must be issued within one year of the filing for bankruptcy in order to suspend the period for assessment. The issuance of a notice of deficiency under section 6212(a) is authorized pursuant to section 6230(a)(2)(A) for items which have converted to nonpartnership items by reason of bankruptcy. The issuance of such a notice will suspend the period of limitations under section 6229(f) pursuant to section 6503(a). Section 6503(a) provides in pertinent part:

(a) Issuance of Statutory Notice of Deficiency.-

(1) General rule.- The running of the period of limitations provided in...section 6229, but only with respect to a deficiency described in section 6230(a)(2)(A)...shall (after the mailing of a notice under section 6212(a)) be suspended for the period during which the Secretary is prohibited from making the assessment...and in any event, if a proceeding in respect of the deficiency is placed on the docket of the Tax Court, until the decision of the Tax Court becomes final...and for 60 days thereafter (emphasis added).

In your request, you posed the following question:

If a partnership return for the tax year ended December 31, 1988 was filed on April 15, 1989, and on April 16, 1989 an investor filed a bankruptcy petition, what is the statute of limitations on the partnership items that have been converted to nonpartnership item?

In applying the aforementioned rules, the Service must make an assessment within one year from the date that the items converted to nonpartnership items. Consequently, the Service would be required to make an assessment before April 16, 1990, one year from the date on which the investor filed the bankruptcy petition. However, if the Service issues a statutory notice of deficiency within the one year period of section 6229(f), the period of limitations will be suspended pursuant to section 6503(a).

3. What are the applicable provisions which will operate to extend the period of limitations under section 6229(f).

The Technical and Miscellaneous Revenue Act of 1988 ("TAMRA") provided an amendment to section 6229(f) to allow for

extensions of the one year statutory period for making assessments. An extension pursuant to section 6229(f) cannot be entered into at the partnership level. Section 6229(b)(1)(B), which authorizes consents at the partnership level, only applies to the statute under section 6229(a). Moreover, section 6229(f) explicitly requires an agreement with "such partner." In addition, the period of section 6229(f) cannot be extended by Form 872-A. Rather, the Service has created a new form, Form 872-F, which must be executed to extend section 6229(f).^{2/}

As noted above, in those cases where section 6229(f) will expire less than a year after the partnership and partner file their returns, we may be willing to assert the application of section 6501 on a case by case basis. These situations will require coordination with the national office.

If an extension, such as a Form 872-A, is executed before partnership items convert to nonpartnership items, the extension will not apply to the converted items unless the extension form expressly refers to partnership items. See I.R.C. § 6229(b)(2). If, after conversion, an extension of section 6501 is executed, the extension should apply to the converted items. A specific reference to partnership items should not be necessary in this second scenario because the taxpayer is no longer treated as having partnership items.

In summary, for planning purposes the only period of limitations that will apply to converted partnership items is section 6229(f). Only in limited circumstances are we willing to assert section 6501 as an alternative. Such a circumstance may be where section 6229(f) will expire less than a year after the partnership and partner returns are due, and the conversion does not occur until after section 6229(f) has expired.

^{2/} The delegation order on the Commissioner's side approving this form has not yet been issued. Until such time as a delegation order is promulgated granting authority to Service personnel to execute such agreements and a new consent form is distributed together with instructions setting forth the circumstances under which it may be used, the section 6229(f) period may not be extended. Moreover, as a general rule, it is desirable that the statutory notice be issued within the unextended one year period.

If you have any additional questions regarding this matter,
please contact Vada Waters at (FTS) 566-3289.

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